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In The
United States Supreme Court

SYLVIA DAVIS, AS GUARDIAN AND NEXT FRIEND FOR DONNELL E. DAVIS; DOSAR-BARKUS BAND OF THE SEMINOLE NATION OF OKLAHOMA; BRUBER BAND OF THE SEMINOLE NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES; DEPT. OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS; GALE NORTON, SECY. OF THE INTERIOR, HER AGENTS, EMPLOYEES AND SUCCESSORS; NEAL A. MCCALEB, ASST. SECY. OF THE INTERIOR FOR INDIAN AFFAIRS, HIS AGENTS, EMPLOYEES AND SUCCESSORS; GLORIA SPYBUCK, SUPERINTENDENT, BUREAU OF INDIAN AFFAIRS, WEWOKA AGENCY; AND JEANETTE HANNA, REG. DIRECTOR, BUREAU OF INDIAN AFFAIRS, EASTERN OKLAHOMA REG. OFFICER, HER AGENTS, EMPLOYEES AND SUCCESSORS,

Respondents.

On Petition for a Writ of Certiorari to the
U. S. Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Barbara J. Olshansky*
Jeffrey E. Fogel
Shayana Kadidal
Attorneys for Amicus
**Counsel of Record*

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

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INTEREST OF AMICUS CURIAE

Amicus curiae submits this brief in support of Petitioners Sylvia Davis *et al.*, with the written consent of the parties.[1] *Amicus Curiae* the Center for Constitutional Rights (the "Center") is a national non-profit legal, educational, and advocacy organization dedicated to advancing the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, the Center has a long history of litigating cases on behalf of Native American nations and nation members, including claims by the Mohawk and Oneida nations to aboriginal lands and cases on behalf of nation members seeking to vindicate their civil and human rights.

ARGUMENT

I. FEDERAL POLICIES MANDATING THE ERADICATION OF RACE DISCRIMINATION AND THE FULFILLMENT OF NATIVE TREATY OBLIGATIONS DEMAND THE COURT'S CONSIDERATION OF THIS CASE

There can be no doubt that the twentieth century will long be remembered in American history as a period of intense struggle for human rights. The victories, however, were frequently won in the courthouse long before they were fully won in the hearts of the American people. Despite the formation of abolitionist groups in the 1800s, and the Union's victory over slavery in the Civil War, the nation

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[1]Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

made little progress toward securing civil and constitutional guarantees for African Americans until well into the twentieth century. Not until 1948 did this Court strike down, as unenforceable, land covenants that forbade the sale or rental of property to African Americans in *Shelley v. Kraemer*, 334 U.S. 1 (1948), and it was not until 1954 that the Court, in *Brown v. Board of Education*, 347 U.S. 483 (1954), ordered an end to segregated schools. Even these victories, however, brought little change to the lives of many suffering the effects of so many years of oppression. The Black Seminoles are among those people who continue to suffer under the weight of such discrimination – discrimination that comes at the hands of both the Seminole Tribe and the federal government and that continues unabated to this day. This case provides the Court with the opportunity to remedy a pernicious injustice and fulfill its historic role by eradicating this persistent form of racism.

The courts below failed to consider two crucial federal policies that should override the application of an equitable rule of discretion in this case. The lower courts' analysis under Rule 19 neglected to balance consideration of tribal sovereign immunity concerns against two long-standing government policies: (a) eradicating race discrimination in all of its manifestations, including those sanctioned by branches of the federal government and subordinate sovereigns; and (b) fostering tribal autonomy and fulfilling the fiduciary obligations created by the treaties between the government and Native nations.

The court of appeals committed two errors in holding that the Seminole Tribe is a necessary and indispensable party within the meaning of Rule 19 and affirming dismissal of the case. *Davis v. United States*, 343 F.3d 1282, 1294

(10th Cir. 2003) ("*Davis II*"). The court of appeals committed two errors. First, when the court considered whether allowing the action to proceed without the Tribe might be prejudicial to the Tribe's interest, it failed to evaluate whether that interest is a legally cognizable one. As demonstrated below, this omission renders the court's Rule 19(a) necessary party analysis fatally deficient. Second, by holding that tribal sovereign immunity cuts off the normal Rule 19 analysis, *id.* at 1293-94, the court improperly altered the Rule 19(b) indispensability analysis when it ignored the crucial fourth factor: "whether an adequate remedy can be found elsewhere," *Davis II*, 343 F.3d at 1293 – a factor which courts have held weighs heavily against dismissal. The court was obligated to weigh the federal policy in favor of tribal sovereign immunity against the federal government's fiduciary relationships with Native nations and their members and the government's unique role in eradicating race discrimination by all subordinate sovereigns – duties embodied in the 1866 Treaty with the Seminoles which was executed contemporaneously with the Civil War Amendments to the Constitution and undertaken for the same purposes.

A. The Tribe's Interest in Discriminating Against Its Black Members Is Not Legally Cognizable Within the Meaning of Rule 19

When a party moves for dismissal on Rule 19 grounds, courts must answer three questions: (i) should the absent party be joined (is the absentee necessary); (ii) if it should be joined, can it be joined; and (iii) if it cannot be joined, should the lawsuit proceed without it nonetheless. *See Western Maryland Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 961 (D.C. Cir. 1990).

The first question requires that the court determine whether the absent party has "an interest relating to the subject of the action." Fed. R. Civ. P. 19(a). Courts have consistently held that such an interest must be a "legally protected interest." *See, e.g., Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49 (2d Cir. 1996) (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983)); *United States v. San Juan Bay Marina*, 239 F.3d 400, 406 (1st Cir. 2001). This Court's rulings make clear that neither an unconstitutional interest nor an interest which contravenes public policy can fulfill the "interest" requirement of Rule 19(a). *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (holding joinder of the United States unnecessary when grant of authority to federal official is unconstitutional or is exercised in an unconstitutional manner); *Work v. Louisiana*, 269 U.S. 250 (1925) (action permitted against Interior Secretary for rejecting state's claim to land based upon an unauthorized ruling of law); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) (action permitted against Interior Secretary for wrongful fixing of limitations on riparian rights).

Here, the district court found that the Department of the Interior's Bureau of Indian Affairs ("BIA") and the absent tribe had conspired to push a trust fund distribution plan which excludes the Black Seminoles past the scrutiny of Congress. *See Davis*, 199 F. Supp. 2d at 1169-71. Simply put, the Seminole Tribe has no "legally protected interest" in creating and maintaining a racially discriminatory system. The foundational document establishing the sovereignty of the modern tribe, the Treaty of March 21, 1866, 14 Stat. 755, acknowledges that "Seminoles ... of African descent and blood" shall "have and enjoy all the rights of native citizens." This treaty was one of five signed in the

immediate aftermath of the Civil War by the federal government and those Native nations that had been aligned with the Confederacy.[2] *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 104 (1982 ed.). These treaties guaranteed the abolition of slavery, and ensured that the rights accorded African Americans by the postwar amendments would be extended as well to African American Indians in their relations with Native nations.[3] *See* Natsu Taylor Saito, *From Slavery and Seminoles to Aids in South Africa: An Essay on Race and Property in International Law*, 45 Vill. L. Rev. 1135, 1173 (2000). Indeed, the 1866 treaties were "instruments of liberation, proclaiming that all slaves residing with Indian nations were to be considered full citizens of the nations." *Id.* Rule 19 cannot operate to preclude claims demanding the "fair and lawful administration" of a nondiscriminatory Judgment Fund distribution plan, *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1502 (9th Cir. 1991) (O'Scannlain, J., dissenting), because no lawful interest of the Tribe can be prejudiced by such demands.

The court of appeals rejected Petitioners' race discrimination showing and the district court's findings on this matter because it believed that any consideration of the issue would impermissibly commingle the jurisdictional

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[2] The Creek, Cherokee, Chickasaw, Choctaw, and Seminole Nations all have members of African descent; thus the issue in this case -- federal compliance with the Seminole Treaty of 1866 – has significant ramifications for African American Indians across this country.

[3] "Treaties were enacted abolishing slavery among the Indians because Indians were not considered U.S. citizens by virtue of the Fourteenth Amendment. *See Elk v. Wilkins*, 112 U.S. 94 (1884) (holding Indian born within United States, who voluntarily separates himself from tribe and resides with white citizens, is not citizen within meaning of Fourteenth Amendment)." Saito, 45 Vill. L. Rev. at 1170 n.198.

inquiry with adjudication on the merits. *See Davis II*, 343 F.3d at 1291. However, an analysis of jurisdictional facts is always necessary before a court can determine that a party has the sort of immunity which may shield it from suit. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 n.16, 122 (1968). Moreover, depending on the facts of the individual case, such jurisdictional factfinding may be fairly extensive. For example, in *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996), the court looked to the jurisdictional facts in "assess[ing] whether the nonparty Tribes have a legally protected interest in" the funds at issue in the litigation. The court analyzed the facts asserted in affidavits submitted by the party moving for Rule 19 dismissal and determined that the funds potentially available to the absent tribes would be so negligibly beneficial that the tribes had no legally protected interest in the funds' distribution. *Id.* Clearly, that court made substantial factual determinations in reaching its conclusion that the absent tribes lacked a legally cognizable interest. Similarly, in *Shenandoah v. United States Dept. of the Interior*, 159 F.3d 708, 714-15 (2d Cir. 1998), the court held that a determination as to the legitimacy of the tribal leader was necessary to determine the jurisdictional question of whether the tribe was "absent." In sum, not only is analysis of the merits permitted under Rule 19, it is necessary.

In addition, courts have recognized a "public rights" exception to the Rule 19 analysis where the litigation "transcend[s] the private interests of the litigants and seek[s] to vindicate a public right." *American Greyhound Racing v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002) (quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1995)); *see Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1500

(D.C. Cir. 1995); *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940) (proceeding vindicates public rights where its purpose is "to give effect to the declared public policy" embodied in the NLRA). Like the Civil War Amendments, the 1866 Treaty, which this litigation seeks to enforce, embodies a desire to vindicate the "larger public interest"[4] of putting an end to the racial discrimination that had torn the nation asunder.

B. The Strong Federal Policy Outlawing Race Discrimination Outweighs the Public Policy Favoring Tribal Sovereign Immunity

The lower courts' decision ultimately rested on what they termed a "strong policy . . . favoring dismissal when a court cannot join a tribe because of sovereign immunity." *Davis II*, 343 F.3d at 1293 (quoting *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) ("*Davis I*")). The court noted that:

> Although we are sensitive to the problem of dismissing an action where there is no alternative forum, we think the result is less troublesome in this case than in some others. . . . This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Davis II, 343 F.3d at 1293.[5] The court's formulation of

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[4] *Kescoli*, 101 F.3d at 1311.

[5] While some court of appeals panels have held that tribal sovereign immunity effectively trumps the ordinary Rule 19 analysis in the same manner, *see, e.g.*, *Keweenah Bay Indian Community v. Michigan*, 11 F.3d

society's public policy choice ignores two critical facts: the federal government has a fiduciary obligation to individual tribe members; and both governments – the Seminole Tribe and the federal government – are bound by the 1866 Treaty to accord "all the rights of native citizens" to the Black Seminoles.

In this regard, the lower court's ruling conflicts with the decision in *Seminole Nation v. Norton*, 223 F. Supp. 2d 122 (D.D.C. 2002). There, the district court was asked to determine whether amendments to the Seminole Constitution that would have expelled the Black Seminoles from the Tribe could properly be rejected by the BIA. The court held that, despite the obviously discriminatory nature of the amendment, it

> must nevertheless attempt to resolve this dispute without sacrificing the Nation's right to retain its integrity and its right to self-determination. But it was [the Tribe], not the [federal government], who sought to adopt amendments to its constitution that would disenfranchise the Freedmen from participation in the political operations of the Nation, in total disregard of the rights afforded to those members by the Treaty of 1866 and the Nation's Constitution.

Id. at 138. The instant case is similar: the Tribe deliberately,

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1341 (6th Cir. 1993); *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543 (8th Cir. 1992); *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), other panels have held otherwise. *See, e.g.*, *American Greyhound Racing*, 305 F.3d at 1025 ("some courts have held that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b), but [the Ninth Circuit] continue[s] to follow the four-factor process even with immune tribes.").

and with the complicity of the BIA, excluded the Black ("Estelusti") Seminoles from the programs established with Judgment Fund monies. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1176 (D. Okla. 1999) ("The record demonstrates [that]... [t]he Estelusti Seminoles are effectively prohibited from participating in Judgment Fund Programs because of the Eligibility Requirement" that they produce proof of descent from a member of the 1823 Seminole Nation). Such efforts and outcomes are incompatible with the 1866 Treaty. As discussed above, the 1866 treaties with the various Native nations effectuated a broad and important federal policy of ensuring the emancipation of Black Indians by extending to them the protections that Congress would soon provide African Americans against discrimination by the states and private parties through the Thirteenth, Fourteenth, and Fifteenth Amendments. The Fifth Amendment already provided protection against such discrimination by the federal government.

Judicial vindication is especially important here because the racially discriminatory policies of the state of Oklahoma so profoundly influenced the political history of the Tribe. The 1907 Oklahoma constitution defined as "black" all persons with any degree of African ancestry, and mandated a segregated society, with public schools, hospitals, housing, cemeteries, and even pay-telephone booths formally separated between the races. The public policy by which the federal government "consciously opted to shield Indian tribes from suit," *Davis II*, 343 F.3d at 1293, should not shield from judicial review the consequences of this state discrimination on the political development of the tribal government over the years.

The decision below, if allowed to stand, would set in stone the Tribe's "total disregard" of the rights guaranteed to the Black Seminoles by the 1866 Treaty. The district court found in that its Rule 19 decision precluded *any* effective relief for the Black Seminoles. "Requiring plaintiffs to maneuver their claim through the Seminole Nation's legislative bodies would, in effect, be futile." 199 F. Supp. 2d at 1178. "The Court's disposition as to the Black Seminoles' Judgment Fund Award claim effectively terminates [their] opportunity to have their [claim] heard by an impartial adjudicative body . . .". *Id.* at 1180. Surely "equity and good conscience" does not command such a result. *See Shields v. Barrow*, 58 U.S. 130 (1855). Indeed, Rule 19 expressly counsels otherwise. *See, e.g., Collins v. General Motors Corp.*, 101 F.R.D. 1, 4 (W.D. Pa. 1982).

II. FEDERAL POLICIES GOVERNING THE FIDUCIARY OBLIGATIONS OF THE UNITED STATES TO NATIVE NATIONS AND THEIR MEMBERS REQUIRE THE COURT'S CONSIDERATION OF THIS CASE

The courts below neglected to consider the overriding federal policies commanding the Executive branch to honor the trust relationship between the government and Native nations and adhere to the treaties signed by them. This failure also mandates reversal of the decision below.

A. The BIA's Abrogation of the 1866 Treaty Constitutes a Serious Breach of the Government's Fiduciary Obligations and an Egregious Violation of Tribal Sovereignty

Although tribal sovereignty is not expressly mentioned in the Constitution, America's first nations were

given constitutional recognition in the Commerce Clause, which gives Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, 8, cl. 3. From pre-colonial times to 1870, tribal sovereignty was expressly recognized in the numerous treaties executed by the British, the colonists, and later the United States, and the various Native nations with which each successive governing entity came in contact.

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), a case concerning a dispute between the Cherokee Nation and the State of Georgia, Chief Justice John Marshall reviewed the historical and legal development of the federal-tribe relationship and found that Native nations had signed treaties and been treated as sovereigns by the European nations. That the United States had continued this relationship of alliances through treaties, he opined, "itself evidenced an acknowledgment of tribes' sovereign status." *Worcester*, 31 U.S. at 559-60. The *Worcester* decision, together with the decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), acknowledged the unique relationship between the United States and Native nations – one that is grounded in treaties, tribal sovereignty, and the Commerce Clause.[6]

The nature of the federal-tribal relationship has long been described in terms of the trust responsibility undertaken

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[6]To be sure, the federal government's recognition of Native nations as independent political entities that possess sovereign authority over their members and territories has always been circumscribed by the principle that these nations, in submitting to the power and protection of the government, necessarily gave up some attributes of their sovereignty. *See Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 209-211 (1978); *United States v. Kagama*, 118 U.S. 375, 379 (1886).

by the United States. *See, e.g.*, Northwest Ordinance of 1787, art. III, 1 Stat. at 52 (establishing a broad federal policy in regard to expansion and concomitantly acknowledging the government's duty to protect tribes); *Worcester*, 31 U.S. at 555 ("This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."). Subsumed under this obligation are specific responsibilities, the fulfillment of which are judged by applicable standards of behavior. As the decisional authority makes clear, the most demanding duty is found when the federal government assumes a fiduciary relationship with a tribe. *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). Fiduciaries are always held to exceedingly high levels of responsibility, and the courts have held that the federal government, once in that role, may not avoid its obligation. *Pyramid Lake Pauite Tribe v. Morton*, 354 F. Supp. 252, 256-57 (D.D.C. 1972).

Accordingly, Native nations have held the government to strict fiduciary standards in suits for breach of the federal trust responsibility with regard to specific tribal interests such as natural resource management or tribal investments. *See, e.g., Gila River Pima Maricopa Indian Community v. United States*, 9 Ct. Cl. 660, 677-78 (1986) (private trust law determines liability for breach of fair and honorable dealing with tribes in the presence of elaborate control of trust resources); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (government breached its fiduciary obligation to tribe by disbursing treaty annuity payments to tribal officials known for mismanagement); *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935) (upholding award of money damages for the taking of tribal

lands without just compensation as a result of a flawed federal survey); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (trust relationship requires the Secretary of Interior to dispose of lands held by tribe in a more exacting fashion than other public land acquisitions). Indeed, in *Seminole Nation*, this Court held that where a treaty required the United States to pay trust funds to tribal members, the federal government was to be judged "by the most exacting fiduciary standards" and should be held responsible for paying the monies to a tribal government that was well-known for misappropriating funds:

> The Seminole General Council, requesting the annuities originally intended for the benefit of the individual members of the tribe, stood in a fiduciary capacity to them. Consequently, the payments at the request of the Council did not discharge the treaty obligation if the Government, for this purpose the officials administering Indian affairs and disbursing Indian moneys, actually knew that the Council was defrauding the members of the Seminole Nation.
> * * *
>
> Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.

316 U.S. at 296-97.

The Court's decision in *Seminole Nation* provides the

roadmap for the proper determination of the issues presented in this case. Once again, the Department of the Interior (Bureau of Indian Affairs) here was charged by Congress with the responsibility of working with the Seminole Tribe to propose a plan for the use of the judgment funds to serve "common tribal needs." *Davis II*, 343 F.3d at 1287. Under these circumstances, the Executive's fiduciary obligation must be deemed to be of the highest order. *See United States v. Mitchell*, 463 U.S. 206, 225-26 (1983).

The plan developed by the Tribe's General Council provided that the Judgment Fund monies would be used for health, education, and social services programs, but did not delineate the parameters of any specific program. Instead, the plan provided that the General Council would develop programs which would be submitted to the BIA for approval. *Davis II*, 343 F.3d at 1287. The programs ultimately developed by the Seminole Judgment Fund Committee (a tribal body created by the General Council) – and approved by the BIA – were governed by tribal resolutions which contained eligibility requirements excluding the participation of the Black Seminoles. *Id.* at 1288. Further, the BIA's violation of its own CDIB card issuance policy – which should have permitted the Black Seminoles to participate in the Judgment Fund Programs – operated as well to bar their participation. *See Davis* at 199 F. Supp. 2d at 1178-80. The district court's jurisdictional findings that "the BIA intended to exclude the Black Seminoles from the benefits of the Judgment Fund Award," *id.* at 1169, and that it "assisted the Seminole Nation in formulating a plan that could prevent the Black Seminoles' participation in the Judgment Fund Award and still receive Congressional approval," *id.* at 1170, are binding on the court of appeals in its review of the district court's Rule 19 analysis. *See Montoya v. Chao*, 296 F.3d

952, 954-55 (10th Cir. 2002) ("We review a dismissal for lack of jurisdiction de novo, accepting the district court's findings of jurisdictional facts unless they are clearly erroneous."). Consequently, the court of appeals was compelled to accept the finding that the Executive participated in a deliberate plan to circumvent both the 1866 Treaty recognizing the Estelusti Seminoles' ancestral membership in the Tribe, and the Judgment Fund Distribution Act of 1990 requiring use of the funds to serve "common tribal needs." Indian Claims Distribution of Funds to Seminole Indians Act, 104 Stat. 143 (1990). The Court should not sanction the BIA's unlawful usurpation of Congressional authority here. *See Morton v. Ruiz*, 415 U.S. 199 (1974) (disallowing BIA's reinterpretation of Act intended to appropriate funds for programs for all Indians).

Given these facts – which the district court found when it necessarily resolved the jurisdictional factual disputes raised by the government's dispositive motions, *see Davis*, 199 F. Supp. 2d 1164 – the Executive's breach of its fiduciary obligation to members of the Seminole Tribe in this case is far more severe than that which this Court deemed unacceptable in *Seminole Nation*. However, neither the district court nor the court of appeals considered this breach when assessing whether the Seminole Tribe is a "necessary party" within the meaning of Rule 19(a). As the court of appeals acknowledges, the district court made no findings or conclusions whatsoever regarding this issue. *Davis I*, 192 F.3d at 959 n.6. The district court plainly erred when it failed to undertake any analysis of whether the Seminole Tribe is a necessary party and failed to assess whether the asserted interest was "legally protectable."

For its part, the court of appeals – without the benefit

of any district court findings on the issue of the Tribe's interest – unilaterally defined the interest as "an interest in determining eligibility requirements and adopting ordinances embodying those requirements," and concluded that such an interest is "neither fabricated nor frivolous." *Id.* at 959. In doing so, the court of appeals implicitly rejected the district court's express findings regarding the government's intent and role – and the Tribe's demonstrated interest – in barring the Black Seminoles from participating in the Judgment Fund Programs. The district court's findings make clear that the tribal resolutions at issue were intended to achieve this impermissible end. *See Davis*, 199 F. Supp. 2d at 1171-72. Because such an interest contravenes the federal policy recognizing the Estelusti people as part of the Seminole Tribe as well as the policy prohibiting race discrimination, *see* Point I, *supra*, it is an unconstitutional interest and cannot be asserted by the Nation as a "legally protected interest" within the meaning of Rule 19(a). Consequently, the Seminole Tribe is not a "necessary" party to this action.

B. The Lower Court's Affirmance of the Rule 19 Dismissal Contravenes This Court's Jurisprudence Governing the Abrogation of Treaty Rights

The government's formal recognition of the Black Seminoles as part of the Seminole Tribe – and their attendant right to seek enforcement of the federal policy promoting tribal self-determination – are guaranteed under the 1866 Treaty, and are therefore protected as the supreme law of the United States under the United States Constitution. *See Worcester*, 31 U.S. at 559-60 (applying the constitutional declaration to Indian treaties); *Bowen v. Doyle*, 880 F. Supp. 99, 136 (W.D.N.Y. 1995). The BIA's abrogation of the Treaty thus compels adjudication of the underlying

substantive issues in order to preserve tribal sovereignty.

The principle is long-standing that treaty rights and protections belong not only to Native nations as nations, but also to the individual members of those nations. *United States v. Winans*, 198 U.S. 371, 381 (1905); *United States v. Dion*, 476 U.S. 734, 738 n.4 (1986) (expressly noting that Indian treaty rights can be asserted by an individual member of the tribe). Further, the courts have specifically held that Native Americans have a right to share in tribal property by virtue of their membership in such tribes, *see, e.g., Halbert v. United States*, 283 U.S. 753, 762-63 (1931), and that this right is "legally enforceable." *See United States ex rel. Mosay v. Buffalo Brothers Management, Inc.*, 20 F.3d 739, 742 (7th Cir. 1994) (action brought by members of tribe to void gaming-related contracts). *Accord Menominee Tribe v. United States*, 391 U.S. 404 (1967) (holding that the federal termination legislation ending federal recognition of tribal entity did not extinguish tribal members' collective hunting and fishing rights as guaranteed in their treaties); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (same).

Indeed, the decisional authority is clear that individual nation members can challenge actions taken by the Department of the Interior that infringe upon the nation's right to self-governance. For example, in both *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), and *Milam v. Department of the Interior*, 10 Indian L. Rep. 3013 (D. D.C. 1983), the courts questioned and modified Departmental actions that affected the identity of tribal representatives. *See also Morris v. Watt*, 640 F.2d 404 (D.C. Cir. 1981); *Coyote Valley Band of Pomo Indians v. United States*, 639 F.

Supp. 165 (E.D. Cal. 1986); *Logan v. Andrus*, 457 F. Supp. 1318 (N.D. Okla. 1978); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

Petitioners in the case at bar seek relief similar to that awarded in *Winans* and *Halpern*. They are members of the Seminole Tribe who seek to vindicate the legal rights guaranteed to them by the United States in the 1866 Treaty. Petitioners seek to compel the BIA to recognize their membership in the Tribe as required by the Treaty and to enforce their attendant right to participate in the Judgment Fund Programs as required by the Distribution Act. The lower court's decision insulating the BIA's collaboration in the exclusion of the Black Seminoles from judicial scrutiny sanctions the BIA's unlawful abrogation of the 1866 Treaty.

Furthermore, Congress's approval of the Seminole Nation's general distribution plan here does not authorize the BIA's abrogation of the Treaty. In *United States v. Dion*, 476 U.S. 734, 739-40 (1986), the Court articulated the principles that Congress's intention to abrogate Indian treaty rights must be "clear and plain," and that "in the absence of explicit statement, the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." Speaking to the issue of the standard for determining how such intent may be demonstrated, the Court noted that "[w]hat is essential is clear evidence that Congress actually *considered* the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* (emphasis added).

Under any interpretation of the facts presented here, there can be no doubt that the Congressional action undertaken here does not meet the test for abrogation of the

1866 Treaty. There is no dispute that neither the eligibility restrictions delineated in the tribal resolutions nor the BIA's CDIB card issuance policy was ever placed before Congress. *Davis*, 199 F. Supp. 2d at 1172-73. Congress simply was never notified that the legislation it was reviewing affected tribal treaty rights. *See Dion*, 476 U.S. at 739. And certainly nothing in the legislation passed by Congress authorizing the Seminole Tribe's general distribution plan demonstrates Congressional intent to abrogate those rights. *Id.* at 740.

Dion's requirement of "clear and reliable" evidence of Congressional intent to abrogate treaty rights provides a judicial check on legislation or Executive action that may go too far in taking away sovereign rights. Here, the BIA's actions are tantamount to an unauthorized revision of the Executive's recognition decision embodied in the 1866 Treaty. Were this Court to decline to review the lower court's decision here, the Department's action would be unreviewable, contrary to the presumption in favor of judicial review of agency action. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). As the Tenth Circuit held in *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (10th Cir. 1997), when tribal sovereignty issues such as federal recognition are involved, the presumption in favor of judicial review trumps the shield of tribal sovereign immunity. The Tenth Circuit opined that no deference would be owed to a BIA recognition decision if the agency "acted contrary to federal law, namely Article 15 of the Treaty of 1866 with the Cherokee Nation," 117 F.3d at 1499, and thus held that the court "must itself decide whether the Delawares constitute a sovereign tribe." *Id.*

Conclusion

Tribal sovereignty is rooted not only in the history of this country, but in the Constitution and the numerous treaties it executed with tribes over the life of this nation. If history teaches us anything, it is that the only federal policy which can be justified, the only policy which is consistent with the historic treaty obligations of the United States, and the only policy which Native peoples will support, is a policy which respects and enforces treaties and requires that all Native Americans be treated fairly. *Amicus curiae* respectfully submit that the Court should grant the petition to vindicate the important federal policies at stake in this matter and to rectify the grievous injustice done to the Black Seminoles.

Respectfully submitted,

Barbara J. Olshansky*
Shayana Kadidal
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6434

Attorneys for Amicus Curiae

**Counsel of Record*

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